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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ELMER PAREDES, Defendant and Appellant.	B213472 (Los Angeles County Super. Ct. No. LA052258)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael A. Latin, Judge. Affirmed.

Russell S. Babcock, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan D. Martynec and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Elmer Paredes (appellant) of six counts of attempted willful, deliberate, and premeditated murder in violation of Penal Code sections 187, subdivision

(a) and 664.[1] The jury found that the crimes were committed for the benefit of a criminal street gang pursuant to section 186.22, subdivision (a). The trial court sentenced appellant to 90 years to life, consisting of six consecutive terms of 15 years to life.

Appellant appeals on the grounds that: (1) the evidence is insufficient to sustain his conviction for the attempted murder charged in count 5; (2) the trial court prejudicially erred by allowing testimony regarding alleged threats against prosecution witnesses, and it compounded the error by excluding defense evidence that a defense witness had not threatened any witness; (3) the trial court prejudicially erred by including "kill zone" instructions on concurrent intent; and (4) instructional error prejudicially undermined the presumption of innocence, lowered the prosecution's burden of proof, and shifted that burden to appellant.

FACTS

Prosecution Evidence

On April 15, 2006, a shooter fired into a crowd of people outside a banquet hall where a birthday party for a 15-year-old girl (a "quinceanera") was being held. Following a police investigation, appellant's fellow gang member, John Tuivai (Tuivai) agreed to testify for the prosecution. Tuivai's girlfriend, Rocio Cordova (Cordova), also agreed to cooperate with the police. Miguel Navarro (Navarro), another of appellant's fellow gang members, also testified for the prosecution.

Tuivai pleaded guilty to two counts of attempted murder and testified in return for leniency. He and appellant were good friends and fellow members of the D.C. gang at the time of the shooting. The two belonged to a particular clique called the D.C. Kings. "D.C." stood for Dangerous Criminals, Doing Crystal, Delicuentes, Damn Crazy, and other names. Appellant was a shot caller, and Tuivai also ranked high in the gang. They ordered other gang members to "do what we do." Appellant was known as "Wicks," and

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[1] All further references to statutes are to the Penal Code unless stated otherwise.

Tuivai was known as "Baloo." The 129 gang was the D.C. gang's main rival, and Tuivai had been shot at by 129 members. In 2004, Tuivai saw appellant and another gang member, Esikio "Filoe" Solorio (Solorio), running from 129 gang members who were shooting at them.

At approximately 11:00 a.m. on April 15, 2006, appellant telephoned Navarro, who was known as Mousey. Appellant told Navarro that some Twinkies—a name for 129 gang members—would be attending a party that night. Navarro agreed to appellant's request to drive him to the party so that they could terrorize the 129 gang members. At approximately noon on April 15, 2006, appellant telephoned Tuivai, who was at Cordova's house. Tuivai and Cordova drove to appellant's house and picked him up. They went to a local park for a time, and at one point, appellant pulled a gun from his waistband. Tuivai had seen appellant with the same gun previously.

At approximately 4:00 p.m., Navarro drove his mother's blue Ford Expedition to pick up appellant at Solorio's home. Tuivai and Cordova were also there. Appellant said he had a handgun, wrapped in a bandanna, in his pocket. He again said he wanted to terrorize the Twinkies.

Navarro drove the group to the banquet hall in the Expedition. In the car, Tuivai spoke to Chris Ulin (Ulin) by telephone. Ulin was a D.C. gang member known as Romer. He was attending the birthday party with his girlfriend. When the Expedition got to the banquet hall, Ulin got in the car. He told the others that many 129 gang members were at the party, and they had been "dogging" him.

Navarro drove the group to a park where some of them drank beer and smoked marijuana. They talked about the 129 gang members at the party, and appellant said he wanted to go back and fight them. The group drove back to the banquet hall, and Ulin got out of the car to rejoin the party. Ulin got into an argument with a fat Hispanic man, later identified as Rene Escarcega (Escarcega), who was a 129 gang member. Tuivai and appellant, armed with a miniature baseball bat, got out of the Expedition to go to Ulin's

assistance. Tuivai rushed up to Escarcega and asked him if he "wanted problems." Escarcega backed off.

Several women were drawn outside by the commotion, and the group in the Expedition left because they were afraid one of the women had written down the license number of the car. The occupants of the Expedition threw gang signs as they drove away, and some of the partygoers responded with their own gang signs. As the group drove back to Solorio's home, appellant repeatedly said he wanted to go back to the party and "fuck up that fat guy." Navarro refused to go, and appellant called him "a little bitch." Navarro dropped off appellant, Tuivai, and Cordova at Solorio's.

In the early evening, another D.C. gang member called Bones arrived at Solorio's in a silver Honda. Bones said the Honda was stolen and had no license plates. Bones gave Tuivai and Cordova a ride to the park to pick up Cordova's car. They all returned to Solorio's where they talked about returning to the banquet hall. Appellant wanted to go back to "catch[] somebody slipping," which meant to catch a rival gang member off guard and hurt him.

At approximately 7:30 p.m., the group set off for the banquet hall in two cars. Cordova drove her black Toyota Corolla with Tuivai in the passenger seat and Solorio in the backseat. Bones drove the silver Honda with appellant in the front passenger seat. There were approximately 10 bald-headed men in front of the banquet hall. Tuivai thought they were 129 gang members. He threw gang signs at them and yelled "Damn Crazy." Appellant yelled out the window of the Honda to the people in the Corolla and told them to follow him as he turned into a side street and then back toward the party. When they reached the banquet hall, Tuivai saw the Honda slow down. He saw appellant put both hands out of the window and fire at the group of men in front of the banquet hall. Some of the men ran, and others dropped to the ground. The Honda sped away and the Toyota followed. Cordova followed the Honda to an apartment where appellant's brother was staying. There the group discussed the shooting and agreed to say nothing to police. Appellant said, "I think I shot three of those fools."

Appellant telephoned Navarro later that night. He sounded "paranoid" and told Navarro that "some shit had gone down." Appellant told Navarro not to talk to the police if they contacted him.

Petar Mitev (Mitev) was waiting for his girlfriend, a waitress at the banquet, at about 8:30 p.m. Mitev stood outside at the front door of the banquet hall conversing with a security guard who was his girlfriend's father. Mitev was shot in the left groin area. He heard six to eight shots coming from the street. In his peripheral vision he saw a gray car passing. He still had the bullet in his body at the time of trial.

Michael Ledesma (Ledesma) was a guest at the party and was also standing outside the banquet hall. He estimated that there were 10 to 15 people outside. Escarcega, who was Ledesma's friend and former neighbor, was there. Ledesma and his brother were examining a defective camera when Ledesma heard "a barrage of firecrackers." He realized someone was shooting at them, and he lay on the ground. Victor Garcia (Garcia) was also with him. After the shooting stopped, Ledesma ran into the hall. When he raised his shirt he saw he had been shot in the left shoulder.

Ledesma knew Ali Nahyan (Nahyan) through Escarcega. He identified a photograph of Nahyan at trial. Ledesma was "pretty sure" that, at the time of the shooting, Nahyan was also among the people in front of the banquet hall.

Garcia was facing the street while smoking a cigarette when he was shot. It was dark outside but there were streetlights. Garcia heard from eight to 12 shots. He saw a black gun in the rear passenger window of a dark sedan. He then recalled telling police the shooter was in the front passenger seat, and that the shooter was in a four-door white Honda Accord or Honda Civic. There were three people in the white car. He believed there was a shooter in the front and in the back, but he saw gunfire coming only from the gun in the back. He did not recall telling a detective there was only one shooter. He then stated there was one shooter, but he saw two guns. Garcia was shot in the left femur and had a plate inserted in his left thigh as a result.

Garcia felt he should not be testifying in court. After his memory was refreshed, he stated that he had felt unsafe testifying at the preliminary hearing. He received a threat on his cell phone on the day of that hearing.

Garcia described the shooter as a male between 18 to 21 years of age with a big nose, a goatee, dark skin, and a shaved head. When shown a photographic lineup by detectives, Garcia circled a photograph of "the guy in the backseat, in the picture, second, and he was looking around." This photograph was of Tuivai. The detectives later went to Garcia's home and showed him more photographs. Garcia circled a photograph of appellant and said he was one of the persons who shot at him. He then said he was not sure. He acknowledged that he wrote, "The guy in the picture 6 is the shooter." He acknowledged identifying appellant in court at the preliminary hearing. He remembered saying that appellant was the person who shot him.

Bryan Gonzalez (Gonzalez) went to the party with Ledesma. He was talking and laughing with people outside the hall when he heard a lot of gunshots. They were coming from a white Toyota. Gonzalez was shot twice. One bullet passed through his leg, and another struck his torso. He ran inside and collapsed. The bullet in Gonzalez's torso remains behind his heart, and he suffers from permanent injuries.

Gonzalez recalled the shooter being in the right front passenger seat of a white vehicle. He remembered a dark Honda Civic driving by also. He told the detectives the shooter was husky, had a thick mustache, and wore a beanie. He also had a goatee. He looked Hispanic.

Detectives showed Gonzalez 24 photographs. He identified one person in People's exhibit 17 and one in People's 18. On the latter one he wrote, "I think he was the shooter. His nickname is Baloo." At trial, Gonzalez explained that he meant to say Baloo was one of the people in the vehicle. When he saw a certain photograph in People's exhibit 17, he realized that person was the shooter. He identified that person as the shooter at the preliminary hearing. That person was appellant.

Defense Evidence

Escarcega was at the banquet hall to celebrate his sister's 15th birthday. He got into an argument with Tuivai outside the hall over some "nonsense." Escarcega told police that appellant and Tuivai got out of a blue Expedition and confronted him. Tuivai had a baseball bat. Escarcega had seen Tuivai pass the hall several times, riding in different cars. Escarcega was shot in the stomach and the leg while standing in front of the banquet hall's front door. He believed the shots were fired from the car in which Tuivai was riding. He did not remember what that car looked like, since a couple of cars had passed by, and he had seen Tuivai in both of them. He then stated that, because Tuivai kept passing by "in the same car," he assumed he was the shooter.

Escarcega identified Navarro in a photographic lineup as the person who drove "the car that shot me." He also told police that the shooter was the same person who drove the Expedition. At trial, he said he did not know why he had identified Navarro as the shooter. He said he had only identified Navarro because he had seen Navarro earlier that day, and he knew Navarro was a D.C. gang member. Escarcega identified Tuivai only as one of the occupants in the car from which the shots were fired.

At trial, Escarcega denied seeing appellant at the scene on the night of the shooting. He had told police previously that appellant was "driving around" at the time of the shooting in a black Honda and an Expedition. At trial, he said he identified appellant as being involved only because he knew appellant was an active rival gang member, and he wanted to get him off the street. Escarcega also stated that he named appellant because he was "guessing." Escarcega testified that he was unable to see all of the people in the car the gunman was in.

Dr. Mitchell Eisen testified as an expert on memory. He explained how memory works in general terms. People often fill in the gaps with inference when retrieving memories. People under stress tend to focus on one aspect of the experience at the expense of their ability to process other information. The focus is commonly on a

weapon when one is brandished. Dr. Eisen also explained the shortcomings of lineups and photographic lineups.

DISCUSSION

I. Sufficiency of the Evidence in Count 5

A. Appellant's Argument

Appellant contends that Ledesma's tentative identification of the photograph of count 5 victim Nahyan and Ledesma's statement that the victim might have been in the area of the shooting was insufficient evidence to sustain the verdict in count 5. The testimony did not prove beyond a reasonable doubt that Nahyan was present at the party, that he was outside of the building at the time of the shooting, or that he was shot.

B. Relevant Authority

The standard of appellate review for sufficiency of the evidence was set out in *People v. Johnson* (1980) 26 Cal.3d 557. When an appellate court seeks to determine whether a reasonable trier of fact could have found a defendant guilty beyond a reasonable doubt, it "'must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.'" (*Id*. at p. 576.) "[S]ubstantial evidence" is evidence that is "reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*Id*. at p. 578.) Before a conviction may be set aside, "it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support it." (*People v. Rehmeyer* (1993) 19 Cal.App.4th 1758, 1765.) A judgment is not subject to reversal on appeal "simply because the prosecution relied heavily on circumstantial evidence . . . ." (*People v. Millwee* (1998) 18 Cal.4th 96, 132.)

C. Evidence Sufficient

At trial, Ledesma testified that he knew Nahyan, and he identified his photograph. Ledesma was "pretty sure" Nahyan was among the people in front of the banquet hall at the time of the shooting. Gonzalez also thought Nahyan was at the party, stating, "I think

he was one of those chaperones," and was dressed in a suit or tuxedo. The prosecution introduced Nahyan's medical records into evidence as exhibit 12, and the defense had no objection to this exhibit. The medical records establish that Nahyan was seen at a Burbank hospital on April 15, 2006, for a gunshot wound to his left heel. He was discharged the following day.

The evidence thus shows that Nahyan was present at the banquet hall and that he suffered a gunshot wound. It was reasonable for the jury to infer that Nahyan was in the "kill zone." Therefore, there was a reasonable hypothesis on which the jury could base a guilty verdict for the attempted murder of Nahyan. (*People v. Rehmeyer*, *supra*, 19 Cal.App.4th 1758, 1765.) Viewed in the light most favorable to the prosecution, the evidence supports the jury's verdict in count 5. (*People v. Johnson, supra,* 26 Cal.3d at p. 576.)

II. Evidence Regarding Threats

A. Appellant's Argument

Appellant contends that the evidence that Garcia had been threatened almost two years before his trial testimony should not have been allowed, and its admission had a prejudicial effect on appellant's right to due process and a fair trial. The error was compounded when the prosecution elicited similar testimony from Cordova. This evidence of threats against Garcia and Cordova was not relevant to any unwillingness on the part of these witnesses to testify at trial, while at the same time it was highly prejudicial. By subsequently refusing to allow appellant to present evidence to counter the prejudicial inference, the trial court violated appellant's rights to present a defense, call witnesses on his behalf, and receive a fair trial.

B. Relevant Authority

Evidence that a witness is afraid to testify or fearful of retaliation is relevant to the credibility of the witness and is admissible. (Evid. Code, § 780; *People v. Gutierrez* (1994) 23 Cal.App.4th 1576, 1587-1588.) For the evidence to be admissible, it is not necessary to show that the defendant personally made threats against the witness or that

the witness's fear of retaliation is directly connected to the defendant. (*People v. Gutierrez, supra*, at pp. 1587-1588.) The jury is entitled to be apprised of not only the witness's fear, but also of pertinent facts that would enable it to evaluate that fear, as long as the limitation of Evidence Code section 352 is observed. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1369.) Evidence of witness fear and possible threats and intimidation by gang members is relevant to explain possible witness bias during testimony. (See *People v. Harris* (1985) 175 Cal.App.3d 944, 957.) "Regardless of [the] source [of the fear], the jury would be entitled to evaluate the witness's testimony *knowing* it was given under such circumstances." (*People v. Olguin, supra*, at p. 1369.)

C. Proceedings Below

Garcia testified that he felt even worse about testifying at trial than he had about appearing at the preliminary hearing. He acknowledged receiving a threat on his cell phone at the time of the hearing. At trial, he said he had no reason to believe appellant was the person who threatened him. The trial court commented to Garcia, "But [the threat] still scared you." Garcia said that it did.

The trial court allowed the prosecutor to elicit that Cordova was made uncomfortable by the presence of someone in the audience whom she believed to be a D.C. member. The trial court subsequently did not allow evidence regarding the recent life of Jose Mendoza, the person to whom Cordova had been referring.

D. No Error

We disagree with appellant. When counsel objected at sidebar to any mention of a prior threat, the prosecutor explained that Garcia had been a difficult witness at the preliminary hearing and would likely be a difficult witness again at trial. Therefore his state of mind was relevant. The trial court pointed out that the jury had already heard that Garcia did not want to be at trial, and the jury was entitled to know if a threat had an impact on Garcia's level of cooperation. Upon further questioning, Garcia said he felt unsafe when testifying at the preliminary hearing and since then his attitude had gone "down low." He felt like not testifying.

Garcia did indeed prove to be a difficult witness at trial. He at first said there were two shooters. He could not explain why he did not tell police there were two shooters at the time. He said he was 80 percent sure there were two and then, seconds later, when asked what was his best recollection, he said "One shooter. That's it. In the back." He disagreed with what he had written on the six-pack previously. When shown another six-pack identification he made, he acknowledged he drew the circle to identify the shooter, and he acknowledged that the person he circled was appellant. Garcia said that the person he identified was in court. After being asked to point to appellant, however, Garcia promptly said, "I don't think it was him, you know, 'cause—now—now, you know, I can't really say if it was him or not, 'cause I didn't really see the shooter at the time. I only saw the guy in the backseat pretty good." When shown another identification he made, Garcia again attempted to retract it and began talking about a second shooter about whom he was not certain. He said he was only 70 percent sure of his identification, although he had been 100 percent sure at the preliminary hearing. Garcia's backtracking and hesitation continued throughout his testimony. Evidence of the prior threat against him was therefore quite relevant to his trial testimony. Furthermore, Garcia's testimony was not prejudicial, since the court specifically stated to Garcia: "Now, you don't have any reason to believe that this defendant is the person who made the threat." In reply, Garcia said "No."

With respect to Cordova, she acknowledged that she had previously lied to Detective Townsend because she was scared. She stated that, "you can't, like, tell on somebody and then expect nothing to happen to you." She said she had been threatened by "different people," and she had felt uncomfortable and scared.

Appellant acknowledges that Cordova's testimony about the threat was relevant to why she lied to police. He argues, however, that nothing "opened the door" for her testimony regarding a person in the courtroom. The presence of someone Cordova knew as a D.C. gang member, however, was directly relevant to her trial testimony, since she was aware of his presence during that testimony and had obviously expressed her

discomfort about his presence to the prosecutor during a recess. Cordova said his presence made her feel uncomfortable because she did not "want them to see me." The evidence helped explain Cordova's prior untruthfulness, which undoubtedly had an effect on her credibility in the eyes of the jury. It was also relevant to her demeanor, which may have been one of nervousness.

The person who made Cordova uncomfortable was later identified as Mendoza. With respect to the exclusion of some of Mendoza's testimony, it is clear that, as the prosecutor argued, the information about Mendoza's military service and nonmembership in a gang had no bearing on Cordova's state of mind, since she knew him from the past as a D.C. gang member.

Moreover, the court's sustaining of the prosecutor's objections to some of defense counsel's questions to Mendoza was not prejudicial, since defense counsel ultimately was able to put before the jury the favorable evidence of Mendoza's background, which was his goal. Mendoza was able to state that he did not come into court to intimidate a witness. The jury heard that he had joined the military in 2003 and had spent four years in the service. He testified that he had provided defense counsel with documents about his military service. Mendoza explained his presence in the photograph of D.C. gang members by saying he was "just hanging around with [D.C.]" because he had no friends at the time. Appellant was his good friend, and their families were friends who had met in church. Thus, as defense counsel wished, Mendoza was shown to be a decent citizen rather than a gang member who was in court to intimidate witnesses. As for Mendoza's credibility, it was more likely to have been diminished by his claim that he did not know if appellant was a D.C. gang member.

We conclude the testimony of which appellant complains was relevant and its admission was not an abuse of discretion. Even if it were erroneously admitted, the evidence was not prejudicial to appellant under any standard. There was never an argument or a suggestion that this evidence reflected consciousness of guilt. The evidence of threats was introduced only for the purpose of establishing the witnesses'

credibility and state of mind, a purpose for which it was highly relevant. (*People v. Olguin, supra,* 31 Cal.App.4th at p. 1368.) The exclusion of some of the evidence counsel attempted to elicit from Mendoza was not ultimately prejudicial, since much of the evidence was allowed. Thus, there is no basis for finding that the trial court's evidentiary rulings rendered appellant's trial fundamentally unfair.

III. Instructions on Concurrent Intent

A. Appellant's Argument

Appellant contends that the trial court's instruction on concurrent intent (CALCRIM No. 600) was misleading and improper, and it erroneously allowed the jury to convict appellant of multiple counts of attempted murder without finding the requisite intent for each count.[2] According to appellant, the instruction impermissibly lightened the prosecution's burden of proof, was not supported by the evidence, and violated his Sixth and Fourteenth Amendment rights to a fair jury trial and due process.

B. Relevant Authority

Purportedly erroneous instructions are reviewed in the context of the entire charge to determine whether it is reasonably likely the jury misconstrued or misapplied the challenged instruction. (*People v. Frye* (1998) 18 Cal.4th 894, 957, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421 & fn. 22.)

A "defendant may be convicted of the attempted murders of any within the kill zone, although on a concurrent, not transferred, intent theory." (*People v. Bland* (2002)

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2 CALCRIM No. 600, the instruction on attempted murder, was read in pertinent part as follows: "A person may intend to kill a specific victim or victims, and at the same time, intend to kill anyone in a particular zone of harm or kill zone. In order to convict the defendant of the attempted murder of any of the people named in counts 1 through 6, . . . the People must prove that the defendant not only intended to kill a specific person present at the scene, but also either intended to kill the person named in the charged count, or intended to kill anyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill the named victim or intended to kill another specific person present, by harming everyone in the kill zone, you must find the defendant not guilty of the attempted murder of the named victim for that count."

28 Cal.4th 313, 331 (*Bland*).) "The conclusion that transferred intent does not apply to attempted murder still permits a person who shoots at a group of people to be punished for the actions towards everyone in the group even if that person primarily targeted only one of them." (*Id*. at p. 329.) Concurrent intent exists "'when the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's vicinity. For example, an assailant who places a bomb on a commercial airplane intending to harm a primary target on board ensures by this method of attack that all passengers will be killed. Similarly, consider a defendant who intends to kill A and, in order to ensure A's death, drives by a group consisting of A, B, and C, and attacks the group with automatic weapon fire or an explosive device devastating enough to kill everyone in the group. The defendant has intentionally created a "kill zone" to ensure the death of his primary victim, and the trier of fact may reasonably infer from the method employed an intent to kill others concurrent with the intent to kill the primary victim. . . . Where the means employed to commit the crime against a primary victim create a zone of harm around that victim, the factfinder can reasonably infer that the defendant intended that harm to all who are in the anticipated zone.'" (*Id*. at pp. 329-330.)

D. Kill Zone Instruction Proper

It is worthy of note that defense counsel did not object to the trial court's reading of CALCRIM No. 600, nor did he request clarifying language for that instruction or any other. As a result, appellant's complaints about CALCRIM No. 600 are forfeited on appeal. (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1236 (*Campos*).) In any event, we conclude that appellant's argument is without merit.

Appellant points out that *Bland, supra*, 28 Cal.4th at page 330, which established the "kill zone" concept, defined "kill zone" as a zone in which the defendant intends to kill "everyone" to ensure harm to a target victim. CALCRIM No. 600 defines the "kill zone" as the zone in which the defendant intends to kill "anyone." By using the word

"anyone" instead of "everyone," defendant claims, the instruction improperly expanded the *Bland* "kill zone" concept and allowed the jury to find him guilty of six counts of attempted premeditated murder without determining his intent to kill each of the victims. He also points out that the final sentence of the "kill zone" paragraph refers to an intent to *harm* everyone in the kill zone rather than to kill everyone in the kill zone, as set forth in *Bland*.

In *People v. Stone* (2009) 46 Cal.4th 131 (*Stone*), our Supreme Court noted that "any possible ambiguity [in CALCRIM No. 600] can easily be eliminated by changing the word 'anyone' to 'everyone,'" and "it would be better for the instruction to use the word 'kill' consistently rather than the word 'harm.'" (*Id.* at p. 138, fn. 3.) The *Stone* court did not indicate, however, that these ambiguities rendered CALCRIM No. 600 erroneous. We therefore evaluate appellant's challenge as we did the challenge in *Campos*—by determining whether there is a reasonable likelihood the jury misconstrued or misapplied the words of the instruction. (*Campos*, *supra*, 156 Cal.App.4th at p. 1243.) In doing so, we conclude there is no reasonable possibility that the jury misconstrued CALCRIM No. 600 so as to eliminate the requirement that it find that appellant had the specific intent to kill each of his victims.

At the outset, other jury instructions made clear that the jury was required to find that appellant intended to kill each person. For example, CALCRIM No. 600 itself instructed the jury that to convict appellant of the attempted murder of the five victims, "the People must prove that the defendant not only intended to kill a specific person present at the scene, but also either intended to kill the person named in the charged count, or intended to kill anyone within the kill zone." CALCRIM No. 601 informed the jury that to find that an attempted murder was done willfully, the jury had to find that the defendant "intended to kill when he acted." As we explained in *Campos*, since the trial court properly instructed the jury on the elements of attempted murder, including the required intent for each charge, "[t]he 'kill zone' portion of CALCRIM No. 600 was superfluous. That theory 'is not a legal doctrine requiring special jury instructions, as is

the doctrine of transferred intent. Rather, it is simply a reasonable inference the jury may draw in a given case: a primary intent to kill a specific target does not rule out a concurrent intent to kill others.' [Citations.]" (*Campos*, *supra*, 156 Cal.App.4th at p. 1243.)

Secondly, as in *Campos*, the "'kill zone'" instruction given in this case is not necessarily inconsistent with *Bland*. (See *Campos*, *supra*, 156 Cal.App.4th at p. 1243.) Although the instruction states that proving defendant guilty of the attempted murder of the nonintended targets requires proof that the defendant intended to kill not only "a specific person present at the scene, but also . . . *anyone* within the kill zone" (italics added), it adds, "If you have a reasonable doubt whether the defendant intended to *kill* the named victim or intended to kill another specific person present by harming everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of the named victim for that count." (CALCRIM No. 600, italics added.) This language is consistent with *Bland* and informed the jury that it could not find appellant guilty of attempted murder of the victims under a "'kill zone'" theory unless it found that he intended to harm "'everyone'" in the kill zone. (See *Campos*, *supra*, at p. 1243.)

Thirdly, "there is little difference between the words 'kill anyone within the kill zone' and 'kill everyone within the kill zone.' In both cases, there exists the specific intent to kill each person in the group. A defendant who shoots into a crowd of people with the desire to kill anyone he happens to hit, but not everyone, surely has the specific intent to kill whomever he hits, as each person in the group is at risk of death due to the shooter's indifference as to who is his victim." (*Campos*, *supra*, 156 Cal.App.4th at p. 1243.)

Moreover, CALCRIM No. 600's use of both "harm" and "kill," although internally inconsistent and imprecise, is also not completely inconsistent with *Bland*. In quoting from *Ford v. State* (Md.Ct.App. 1993) 625 A.2d 984, a case on which it relied in adopting the "kill zone" theory, *Bland* stated, "'The intent is concurrent . . . when the nature and scope of the attack, while directed at a primary victim, are such that we can

conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's vicinity.'" (*Bland*, *supra*, 28 Cal.4th at p. 329.)

Appellant points out that in *Campos* the shots were fired into a particular vehicle creating a clearly defined zone. He notes that in this case, there was no confined area that was a "kill zone." Nothing in *Bland* or *Campos* suggests that the victim must be confined within a physical boundary such as the inside of a car or a house in order for a "kill zone" to be created. In fact, *Ford v. State* gave as an example of a "kill zone" the situation when "a defendant who intends to kill A and, in order to ensure A's death, drives by a group consisting of A, B, and C, and attacks the group with automatic weapon fire or an explosive device devastating enough to kill everyone in the group. The defendant has intentionally created a 'kill zone' . . . ." (*Ford v. State*, *supra*, 625 A.2d at pp. 1000-1001, as cited in *Bland*, *supra*, at p. 324, fn.3, 330.) The example in *Ford v. State* is what occurred here, where approximately 12 shots were fired into a group of people. Furthermore, the kill zone need not be defined as the entire area in front of the banquet hall, but rather the narrower zone of persons who were near Escarcega and hence in the line of fire.

Even if reading the "kill zone" the instruction was erroneous, the error was harmless in that it was not reasonably probable that, if the offending words in the instruction were changed, a verdict more favorable to defendant would have resulted. (*People v. Palmer* (2005) 133 Cal.App.4th 1141, 1157 [misdirection of the jury, including incorrect, ambiguous, conflicting, or wrongly omitted instructions that do not amount to federal constitutional error, are reviewed under the harmless error standard articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836].) The evidence of defendant's intent to kill his victims was overwhelming under the "kill zone" theory or otherwise. Appellant sought retaliation for the perceived disrespect of a fellow gang member and himself. He persuaded his companions to accompany him on his mission, and he let loose a volley of gunshots even though Escarcega was surrounded by innocent bystanders. Six people were wounded. On this evidence the jury would almost certainly

have found intent by appellant to kill everyone in the area in order to ensure that he killed Escarcega, his apparent target. The prosecutor underscored this in closing argument, when he argued that appellant was clearly targeting Escarcega, but it was also clear that he intended to kill everybody in that area in order to get to Escarcega. Moreover, the jury found that the attempted murder of each victim was willful, deliberate and premeditated. This finding required the jury to conclude that defendant "intended to kill when he acted." (CALCRIM No. 601.) Appellant's arguments regarding CALCRIM No. 600 are without merit, and his rights to a fair jury trial and due process were not violated.

IV. Various Alleged Instructional Errors

A. Appellant's Argument

Appellant argues that CALCRIM Nos. 220, 222, 223, and 302, individually and taken together, undermined the presumption of innocence and shifted the burden of proof to the defense.

He contends that CALCRIM Nos. 220[3] and 222[4] limited the jury's determination of reasonable doubt to the evidence received at trial. Therefore, they precluded the jury from considering the lack of other evidence corroborating the weak eyewitness testimony. The reference in CALCRIM No. 223 to "disproving" the elements of a charge improperly suggested that the defense must disprove a charge to warrant an acquittal,

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3 CALCRIM No. 220 was read as follows in pertinent part: "In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant's guilt beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty."

4 CALCRIM No. 222 was read as follows in pertinent part: "You must decide what the facts are in this case. You must use only the evidence that was presented in this case in this courtroom. Evidence, as I told you before, is the sworn testimony of the witnesses, the exhibits admitted into evidence, and any stipulations that I told you about and that you heard about during the trial."

which is clearly incorrect.[5] The directive in CALCRIM No. 302 that jurors "must decide what evidence, if any, to believe" in case of a conflict in the evidence is incorrect, since exculpatory evidence need not be believed in order to raise a reasonable doubt.[6]

According to appellant, the instructions were prejudicial as to all counts, since it is reasonably possible that, if correctly instructed, the jurors would have entertained a reasonable doubt as to whether appellant had the requisite intent for attempted murder.

B. Relevant Authority

"In assessing a claim of instructional error, 'we must view a challenged portion "in the context of the instructions as a whole and the trial record" to determine "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution."'" (*People v. Jablonski* (2006) 37 Cal.4th 774, 831; see also *Estelle v. McGuire* (1991) 502 U.S. 62, 72-73.) In doing so, we must "'"'assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given.'"'" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1148–1149.) "We can, of course, do nothing else. The crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions." (*People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17.)

Failure to object to instructional error waives the objection on appeal unless the defendant's substantial rights are affected. (§ 1259; *People v. Guerra*, *supra*, 37 Cal.4th at p. 1134; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1192.) "'[S]ubstantial rights'" are

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5 CALCRIM No. 223 was read as follows in pertinent part, "Both direct and circumstantial evidence are acceptable types of evidence to prove or disprove the elements of a charge, including intent and mental state and the acts necessary to a conviction. And neither is necessarily entitled to any greater weight than the other, and neither is necessarily any more reliable than the other. You must decide whether a fact in issue has been proved based on all the evidence."

6 CALCRIM No. 302 was read as follows in pertinent part: "If you determine there's a conflict in the evidence, you must decide what evidence, if any, to believe."

equated with error resulting in a miscarriage of justice under *People v. Watson*, *supra,* 46 Cal.2d at page 836. (*People v. Arredondo* (1975) 52 Cal.App.3d 973, 978.)

C. No Instructional Error

As respondent has pointed out, it was incumbent upon appellant to request clarifying instructions that addressed any potential misunderstanding the instructions taken together may have imparted to the jury. Although an appellate court may review alleged instructional error that implicates a defendant's substantial rights, a claim that an instruction, correct in law, should have been modified "is not cognizable . . . because defendant was obligated to request clarification and failed to do so." (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1134.) Appellant did not object to the challenged instructions at the trial. In any event, his claims are without merit.

Each of the challenged instructions, when read in isolation, is a correct statement of the law. Appellant's contention that the instructions when taken together may have misinformed the jury is contrary to several recent decisions in the Courts of Appeal, including our decision in *Campos*, *supra*, 156 Cal.App.4th at pages 1237-1238 [CALCRIM No. 220 not misleading]. (See, e.g., *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1190-1191, 1185-1186 [no error in reading of CALCRIM Nos. 220, 223, 302]; *People v. Flores* (2007) 153 Cal.App.4th 1088, 1091-1093 [CALCRIM No. 220 and CALCRIM No. 222, read together, do not lead to misunderstanding by jury]; *People v. Anderson* (2007) 152 Cal.App.4th 919, 929-930, 938-940, 943-944 [no error in reading of CALCRIM Nos. 220, 223, 302]; *People v. Hernández Rios* (2007) 151 Cal.App.4th 1154, 1156-1157 [CALCRIM No. 220 not subject to misinterpretation]; *People v. Westbrooks* (2007) 151 Cal.App.4th 1500, 1505-1510 [CALCRIM No. 220 not misleading when CALCRIM Nos. 222 and 223 also given].) We adhere to the views expressed in those opinions and reject appellant's arguments. The giving of these instructions did not violate appellant's substantial rights.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, P. J.

BOREN

We concur:

_____, J.

DOI TODD

_____, J.

ASHMANN-GERST